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NOTES

MONTANA'S SURVIVAL STATUTE—A CONSTITUTIONAL QUANDRY

INTRODUCTION

In 1961 the Thirty-seventh Legislative Assembly of the State of Montana enacted into law the Montana Rules of Civil Procedure¹ (hereinafter M. R. Civ. P.). With the enactment of these rules, prior statutes deemed inconsistent therewith were repealed. One such statute, apparently repealed by mistake, was the General Survival Statute² which was shown as superseded by Rule 25, M. R. Civ. P. and as repealed by section 84 of the Act. Because of this apparent mistake, the 1963 Legislature reenacted the Survival Statute, the reenactment to take effect retroactively as of January 1, 1962,³ the date that the M. R. Civ. P. went into effect.

It is the purpose of this note to discuss the constitutional questions raised by this statute and to determine whether the Montana judiciary when faced with the issue, can properly decide that the statute can be applied retroactively without violating the constitution.

I.

The Montana Constitution, Article 3, section 11 provides: "No *ex post facto* law, nor law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises or immunities shall be passed by the legislative assembly." In considering retroactive application of statutes, this constitutional provision was interpreted by the Montana court in *Bullard v. Smith*⁴ in these words: "It follows that the legislature was therefore untrammelled and free, in so far as constitutional provisions were concerned, to pass any retrospective laws which did not violate the obligations of contracts or *interfere with any vested rights*."⁵

It is a generally accepted principle of constitutional law that if a statute is procedural in nature, a retroactive application of the statute does not interfere with vested rights, for "the right to a particular remedy is not a vested right."⁶ As another author phrased the conclusion, "A statute providing a remedy where none existed previously is valid, as are statutes providing new remedies and applying them to past transactions. Retroactive laws affecting procedure will be sustained."⁷ That the Montana court has recognized this principle is demonstrated by the language in *Durocher v. Myers*,⁸ wherein the court said: "Laws which have a retroactive

¹LAWS OF MONT. 1961, ch. 13.

²REVISED CODES OF MONTANA, 1947, § 93-2824. (Hereinafter Revised Codes of Montana, 1947, will be cited R.C.M.).

³LAWS OF MONT. 1963, ch. 14.

⁴28 Mont. 387, 72 Pac. 761 (1903).

⁵*Id.* at 397, 72 Pac. at 763. (Emphasis added).

⁶2 COOLEY, CONSTITUTIONAL LIMITATIONS 754 (8th ed. 1927).

⁷2 SUTHERLAND, STATUTORY CONSTITUTION § 2210 (3d ed. 1943).

⁸84 Mont. 225, 274 Pac. 1062 (1929).

effect are clearly valid, where they merely add to the means of enforcing existing obligations and are just and reasonable. . . .'⁹

On the other hand, it has been held that a retroactive application of a statute affecting substantive matters may interfere with vested rights. Thus in *Cusick v. Feldpausch*¹⁰ the Michigan court, in determining whether the repeal of a statute upon which liability was predicated forced the abatement of a cause of action which had arisen prior to the repeal, said:¹¹

This is not a case involving a mere change in remedy or procedure, and cases cited in that regard are not in point. The statute provides a rule of substantive law. (citations omitted) The effect of the change, if given retrospective effect, would be to deprive plaintiff and others similarly situated of right of action. This court has recognized that a common-law right of action is property and entitled to protection. (citations omitted) By the weight of authority, a statutory right of action for damage to person or property, which has accrued, is a vested right, and likewise to be protected. The rule is otherwise in respect of remedy, of mere penalties, of procedure, and of rights merely inchoate or expectant.

Whether survival statutes are substantive or procedural is not certain. In fact, there would seem to be no persuasive argument against holding the same statute procedural for one purpose and substantive for another. Professor Walter Wheeler Cook has suggested that "If . . . we examine into the distinction between 'substantive law' and 'remedial or procedural law' as that distinction is involved in legal problems, we find that this distinction is drawn for a number of different purposes, each involving its own social, economic, or political problems."¹²

If it is once admitted that the terms "vested," "substantive," and "procedural" are relative terms, most often used to explain or justify a conclusion perhaps the problems becomes clear. As Cook explained, each distinction between substance and procedure involves its own social, economic, or political problems. To say that certain rights are to be protected because they are "vested rights" begs the question. It must be determined which rights are to be protected and which are to be subject to infringement in light of the interests and the policy considerations involved. "By vested right can be meant no more than those rights which under particular circumstances will be protected from legislative interference."¹³

To demonstrate his thesis, Professor Cook enumerates eight legal problems, indicating how a court might differ in its interpretation of the same statute depending upon the considerations involved. For example, he lists the constitutional problem in retroactive application of a law, indicating that constitutional objections are overcome if the statute is found to be procedural. Again, he suggests the conflicts of law problem wherein a court must determine whether a particular law is substantive or procedural in order to apply the procedural law of the forum and the substantive law

⁹*Id.* at 232, 274 Pac. at 1065.

¹⁰259 Mich. 349, 243 N.W. 226 (1932).

¹¹*Id.* at 227.

¹²Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 342 (1932-33).

¹³*Supra* note 7 at § 2205.

of the foreign state. Dependent upon the interests affected and the policies to be effectuated, a court might well hold the same statute to be procedural for one purpose and substantive for another.

The California court, in two recent cases, was confronted with the problem posed by Professor Cook in the examples above. In *Cort v. Steen*,¹⁴ the California court held that its survival statute was substantive for purposes of retroactive application. In *Grant v. McAuliffe*,¹⁵ the same court held that the same statute was procedural for purposes of conflicts of law, determining that the California statute could be applied in an action commenced in California, although based upon a personal injury inflicted in Arizona. The court, in the *Grant* case, said: "[A] statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made."¹⁶

Although the California court determined that its survival statute was substantive for purposes of retroactivity, it is submitted that that decision should not be of controlling force in resolving the problem presented in Montana. In the *Cort* case, the California court had no legislative expression of intent to guide it, and concluded that in the absence of such an indication, the legislature probably intended the act to be applied only prospectively.¹⁷ In contrast, the Montana court has an express indication of intent by the Montana Legislature that the statute be applied retroactively.¹⁸

Three years after the *Cort* decision, the California court in the *Grant* case, speaking through Justice Traynor, advanced some persuasive logic for the position that survival statutes can be construed as procedural. While Justice Traynor was concerned with an application of the statute in a conflicts problem, his reasoning provides a sound basis for solution of the constitutional question here under consideration. After a review of the cases holding both ways on the question, the court stated:¹⁹

Many of the cases . . . holding that survival is substantive . . . confused the problems involved in survival of causes of action with those involved in causes of action for wrongful death . . . The problems are not analogous. A cause of action for wrongful death is statutory. It is a new cause of action vested in the widow or next of kin, and arises on the death of the injured person. Before his death, the injured person himself has a separate and distinct cause of action and, if it survives, the *same cause of action* can be enforced by the personal representative of the deceased against the tortfeasor. *The survival statutes do not create a new cause of action*, as do the wrongful death statutes . . . They merely prevent the abatement of the cause of action of the injured person, and provide for its enforcement by or against the personal representative of the deceased.

There is one argument for the proposition that survival statutes are procedural that seems persuasive. The Montana statute provides that

¹⁴36 Cal. 2d 437, 224 P.2d 723 (1950).

¹⁵41 Cal. 2d 859, 264 P.2d 944 (1953).

¹⁶*Id.* at 948.

¹⁷*Supra* note 14 at 725.

¹⁸LAWS OF MONT. 1963, ch. 14.

¹⁹*Supra* note 15 at 947. (Emphasis added).

"an action, or cause of action, or defense shall not abate by death"²⁰ of either party, or if the action has not yet been begun or the defense interposed, the action may be begun or the defense set up in the name of the representative or successor in interest. Thus the statute provides that neither the death of the injured party or of the tortfeasor shall abate an action or cause of action or defense. If we assume that the injured party commences an action, and that the tortfeasor dies, either before the action is commenced or while the action is pending, the action which the injured party is allowed to enforce against the personal representative of the tortfeasor is surely not a new cause of action. It is nothing more than the original cause of action, based on the injury originally inflicted, with the statute providing a remedy for enforcement of the action. It seems clear in this instance that the statute merely provides a procedural device for enforcing an existing cause of action.

If it is the injured person who dies while an action is pending or before it has been instituted, the analogy is not quite so clear. However, as Justice Traynor pointed out in the *Grant* case, the action which the personal representative enforces is the same cause of action that the injured party possessed at his death. Again, the statute is merely providing a remedy for enforcing an existing cause of action.

The Montana court has considered the question whether a survival statute is substantive or procedural, although not for purposes of retroactive application of the statute. In *Dillon v. Great Northern Railway Co.*²¹ the court said: "Every survival statute presupposes the existence of a cause of action in favor of the injured party. *Such a statute does not create a new cause of action*, but only carries forward the right which the injured party had before his death."²² Thus it is obvious that the Montana court contemplated that the survival statute provided merely a remedy for the continuance of the cause of action which existed prior to the death.

One other question might be presented to the court when it determines whether the survival statute is substantive or procedural for constitutional purposes. The legislature, in reenacting the statute, purported to determine that the statute is substantive in nature.²³ It may be argued that this Legislative determination is binding upon the court. It is submitted that the court should not feel bound by this legislative determination, for the matter is properly one for judicial interpretation. Article 4, section 1 of the Montana Constitution provides:

The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Nothing in the Constitution allows the Legislature to determine whether a statute is procedural or substantive in nature. Because of the

²⁰*Supra* note 18.

²¹38 Mont. 485, 100 Pac. 960 (1909).

²²*Id.* at 492, 100 Pac. at 962. (Emphasis added).

²³*Supra* note 18.

separation of powers doctrine under which our government operates, it would be an incongruity for the Legislature to enact legislation and at the same time determine its constitutionality. To hold that the Legislature can determine whether a statute is procedural would, in some cases, be paramount to enabling that body to determine constitutionality of its Acts, for as noted previously, "retroactive laws affecting procedure will be sustained."²⁴ Therefore, the Legislature would need only recite that it considered certain legislation to be procedural and there could be no question concerning its retroactive application. Such a position would be contrary to the separation of powers doctrine. Constitutional questions of retroactive application of statutes must remain for the final determination of the courts, upon whom rests the duty of deciding whether legislative actions fall within constitutional limitations.

Thus, while the Montana Legislature undertook to determine that the survival statute is substantive law, it is submitted that the recital is of no validity and constitutes nothing more than surplus verbiage, particularly when the expressed intent of retroactivity is considered.

Even if the contention above be rejected, the court can still find that the statute is procedural. The Montana court, in *Shapard v. City of Missoula*,²⁵ said:²⁶

While the general rule of construction requires every word found in a statute to be given force and effect, nevertheless, when words or expressions are found therein to which no meaning can be assigned consistent with the legislative intent as collected from the entire act, such words and expressions are to be treated as surplusage and wholly disregarded.

It is to be noted that the court spoke of the legislative intent as collected from the entire Act. In the present situation the Legislature would seem to have had two intents: first and foremost, that the statute be applied retroactively and second, that the statute be interpreted as substantive in order to effectuate the primary intent of retroactive application. It is apparent that the Legislature misconstrued the law dealing with the constitutional questions involved. Should the court find that the legislative intent of retroactivity would be thwarted by a finding that the statute is substantive, it should feel free to disregard the recital as to the nature of the statute.

As a third basis by which the court could effectuate the intent of the Legislature, it could substitute the word "procedural" for the word "substantive" in the Act. The Montana court has recognized that this action may also be proper, saying in *Pomeroy v. State Board of Equalization*²⁷ that "Words may be changed in a statute in order to compel its conformity with the intention of the legislature."²⁸ One eminent author in the field of statutory construction has expressed the same general principle in these terms: "Courts have permitted the substitution of

²⁴2 SUTHERLAND, STATUTORY CONSTITUTION § 2210 (3d ed. 1943).

²⁵49 Mont. 269, 141 Pac. 544 (1914).

²⁶*Id.* at 276, 141 Pac. at 546.

²⁷99 Mont. 534, 45 P.2d 316 (1935).

²⁸*Id.* at 538, 45 P.2d at 318.

one word for another . . . where it is obvious that the word used in the act is the result of . . . mistake.'⁹⁹

It is conceded that most of the cases in which a word is substituted or changed involve cases of typographical error, and no case in point could be found. However, the same principles should be applicable to obvious errors where, as here, it is apparent that the Legislature misunderstood the constitutional basis of the problem with which it dealt. The primary intention of the Legislature is clear—that the statute be applied retroactively. If the court feels that the statute can be found to be procedural, and determines that such a finding is necessary for a retroactive application of the statute, then the court should feel free to so hold.

It has sometimes been said that retroactive laws are suspect because they make the law uncertain. It is argued that persons have relied upon the law as it stood at the time of the transaction. While this argument has validity in the field of contracts, it seems highly doubtful when applied to the law of torts. It would seem most unlikely that a tortfeasor relies upon the fact that he might not be subject to suit when he commits a tort, particularly in the personal injury field.

As has been noted, the cases and authorities are not in accord on the question presented. The Montana court should feel free to arrive at its own decision. Inherent in the court's determination will necessarily arise such factors as the primary intent of the Legislature that the statute be applied retroactively; the fact of probable mistaken repeal of the statute by the 1961 Legislature; a determination to the court's own satisfaction whether the statute can properly be characterized as procedural if such is necessary for retroactive application, at least for purposes of the constitutional question here involved; a determination of whether public policy requires that the statute be enforced retroactively in order to provide a remedy for injuries incurred while the statute was repealed; and the fact that the Montana court has previously held, in the *Dillon* case, that the statute is procedural. While that case is not determinative of the question here presented, it should be persuasive, especially when coupled with the legislative intent and the policies to be effectuated.

II.

Assuming then that the court has fairly determined whether the statute is procedural or substantive, can the statute properly be applied retroactively?

As to injuries inflicted after the repeal, but where death did not occur until after the reenacted statute went into effect, the statute should clearly be applicable if it is found to be procedural.

Three Texas cases considered this exact question, and each time the court determined that the representative could maintain the suit.¹⁰⁰ In the first of those three suits, *Houston and Texas Central Railroad Co. v.*

⁹⁹*Supra* note 25 at § 4925.

¹⁰⁰*Houston & Tex. Cent. R.R. v. Rogers*, 39 S.W. 1112 (Tex. Civ. App. 1897); *City of Marshall v. McAllister*, 43 S.W. 1043 (Tex. Civ. App. 1898); *Missouri, Kan. & Tex. Ry. of Tex. v. Settle*, 47 S.W. 825 (Tex. Civ. App. 1898).

Rogers,³¹ the injury occurred prior to the passage of the statute allowing survival of the cause of action. Subsequent to its passage, Rogers, the injured person, died. His wife was allowed to prosecute the action which had accrued to Rogers during his lifetime, the court saying:³²

At the time this act went into effect there was a valid cause of action existing in favor of James Rogers against the appellant. The passage of the act by the legislature authorizing the survival of suits . . . did not interfere with any vested right of the appellant, and was not contrary to the constitution.

The Texas court spoke only in terms of prospective application of the statute, obviously feeling that the application which it was allowing was not retroactive. The act upon which the action was predicated was phrased in terms of prospective application, providing that "From and after the passage of this act"³³ actions should survive.

The same court, in *Missouri, Kansas and Texas Railway Co. of Texas v. Settle*,³⁴ in answer to the contention that the law was retroactive, said:³⁵

It is contended that, because the cause of action accrued before the passage of the act, the law is retroactive in its effect, and is therefore unconstitutional . . . Settle was alive, and the cause of action was in existence (at the time of the passage of the act) . . . inasmuch as the right of action was perfect when the statute was passed, it was within the power of the legislature to prevent the loss of it in the future through Settle's death.

Thus, if the statute is procedural, it is submitted that an application of the statute in the factual situation proposed should be proper. Such an application would not be retroactive but strictly prospective in nature, and there should be no question of interference with vested rights. The Montana court should follow the reasoning of the Texas court.

However, if the injury was inflicted after the repeal, but death occurred prior to the reenactment, an application of the statute would clearly seem to be retroactive.

In order to hold that the statute may constitutionally be applied retroactively, the Montana court must find that there will be no interference with vested rights. If the statute is found to be procedural, then a retroactive application of the statute should be proper. As noted earlier, the Montana court has held that "Laws which have a retroactive effect are clearly valid, where they merely add to the means of enforcing existing obligations and are just and reasonable."³⁶

Should the court find that the statute is substantive, then it must determine whether a retroactive application of the statute will interfere with any vested rights.

Again it would seem that a proper approach to the problem of classifying the statute requires an inquiry into the interests to be affected

³¹*Supra* note 31.

³²*Id.* at 1113.

³³*Id.* at 1112.

³⁴*Supra* note 31.

³⁵*Id.* at 827.

³⁶*Durocher v. Myers*, 84 Mont. 225, 232, 274 Pac. 1062, 1065 (1929).

and the policies to be effectuated. Although a court might feel that this statute should properly be considered as substantive for certain purposes, it is submitted that Professor Cook's thesis and the approach adopted by the California court is sound. Should the Montana court determine, after a thorough analysis of all the interests involved, that justice will be best served by a retroactive application of the statute, it can properly reach this end by adopting Professor Cook's approach. On this basis, an application of the statute to situations in which the death occurred prior to the reenactment would violate no constitutional safeguards.

III.

Another problem certain to arise relates to the original repeal of the survival statute in 1961. What happened to causes of action which had arisen, but had not yet been filed? Second, what happened to causes of action pending at the time of the repeal?

It is settled that a statute providing for survival of causes of action is not a codification of the common law, and that no such right existed at common law.⁸⁷ The right of the representative to maintain the suit is based solely on the statutory declaration of the remedy.

Under the orthodox view those causes of action, whether pending or not, abated with the repeal of the statute upon which they depended in the absence of a saving clause. As expressed by the California court in *Callet v. Alioto*,⁸⁸ the general rule is:⁸⁹

[T]hat a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute . . . The justification for this rule is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time.

That the Montana Legislature intended this position to be followed by the Montana court is evidenced by R.C.M. 1947, section 43-512, which provides: "Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal." This legislative pronouncement is in accord with the general principle enunciated in the *Callet* case, and as expressed by Sutherland:⁹⁰

The effect of the repeal of a statute where neither a saving clause nor a general saving statute exists to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act *in futuro* and to divest the right to proceed under the statute which, except as to proceedings past and closed, is considered as if it had never existed.

The Montana court, in *Continental Oil Co. v. Montana Concrete Co.*,⁹¹ adopted and followed the orthodox rule, saying that "It is the general

⁸⁷*Dillon v. Great No. Ry.*, 38 Mont. 485, 100 Pac. 960 (1909); *Cort v. Steen*, 36 Cal. 2d 437, 224 P.2d 723 (1950).

⁸⁸210 Cal. 65, 290 Pac. 438 (1930).

⁸⁹*Id.* at 440.

⁹⁰1 SUTHERLAND, STATUTORY CONSTITUTION § 2042 (3d ed. 1943).

⁹¹63 Mont. 223, 207 Pac. 116 (1922).

rule that the repeal of a statute without any reservation takes away all the remedies existing under the repealed act, and defeats all actions pending under it at the time of its repeal."⁴²

In that case, plaintiff's filed suit against the defendant corporation, alleging that the directors of the corporation had incurred debts exceeding the subscribed capital stock of the corporation. The statute under which the action was brought provided that "The directors of corporations must not . . . *create debts beyond their subscribed capital stock . . .*"⁴³ The statute went on to provide that in case of violation of this provision, the directors were jointly and severally liable to the corporation and the creditors thereof to the full amount of the debt contracted. After judgment was recovered, but before it was satisfied, the Legislature amended the statute in question, *deleting the provisions noted above in italics.*" The question for the court was whether the amendment operated to destroy the right to recover against the directors. The court held that the right was destroyed, saying that the repeal of the portion of the statute imposing liability took away the remedy. Thus, the Montana court followed the orthodox rule and actions which had not yet been completed were abated.

The *Continental Oil* case was overruled by the Montana court in *Continental Supply Co. v. Abell*,⁴⁴ the court expressly stating that it overruled the prior case. However, it is submitted that the *Abell* case is completely distinguishable on its facts, that the court had absolutely no reason to overrule the *Continental Oil* case and that the language to that effect constitutes nothing more than dicta.

In the *Abell* case, the directors of a corporation had failed to meet statutory requirements relating to the filing of a financial report of the corporation.⁴⁵ Subsequently, the statute which imposed liability on the directors for failure to file this report was amended, but the amendment did not remove the liability of the directors, nor delete from the statute the language upon which the liability was predicated. It will be remembered that the amendment in the *Continental Oil* case did delete the language upon which liability was predicated. The court, in determining whether the cause of action in *Abell* abated, held that it did not. The court placed its holding on the requirement of section 4 of the Revised Codes of 1921 which provided:

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the Codes or other statutes of the state of Montana. The Codes establish the law of this state respecting the subjects to which they relate and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and to promote justice.

The court also noted that section 93, Revised Codes of 1921 applied. That section provided:

Where a section or a part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended

⁴²*Id.* at 230, 207 Pac. at 118.

⁴³REVISED CODES OF MONTANA, 1921, § 3837.

⁴⁴LAWS OF MONT. 1919, ch. 37.

⁴⁵95 Mont. 148, 24 P.2d 133 (1933).

⁴⁶REVISED CODES OF MONTANA, 1921, § 6003.

form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment. (Emphasis added.)

In the light of these two provisions, the court felt that it was required to hold that the cause of action was not abated by the amendment. It is submitted that the court achieved the correct result, i.e., the cause of action did not abate, but arrived at this result for the wrong reasons.

The court noted the general rule prevailing in all jurisdictions to the effect that when a statute is⁴⁷

'amended so as to read as follows' and closes with the provision that 'all Acts and Parts of Acts in conflict herewith are hereby repealed,' the legislature evinces 'an intention to make the new Act a substitute for the old one and that so much only of the original Act as is repeated in the new one is continued in force, and all portions omitted from the new Act are repealed.'

The court was concerned however that this was a rule of strict construction, and argued that section 4 quoted *supra* requires a liberal construction. The court had no occasion to be concerned with this problem, for even under the rule of strict construction the cause of action would not have abated.

Section 93 of the 1921 Code is declaratory of the general rule of statutory construction, and accords with the court's explanation of the general rule set out above. Thus, when a statute is amended, portions which are not altered are considered as having been the law from the time they were first enacted. Since the amendment with which the court was concerned in the *Abell* case did not alter the language upon which liability of the directors was predicated, the court was correct in declaring that the cause of action did not abate. The amendment had no effect upon the liability of the directors at all.

To reach this result it was entirely superfluous for the court to declare that the *Continental Oil* holding was overruled, since the court had no occasion to consider the question. The elements of statutory construction involved in the two cases were entirely different and distinct. The Montana court should reexamine the holding in *Abell* in regard to the overruling of the decision in *Continental Oil*. That case states the generally accepted rule of statutory construction when an amendment repeals a statute upon which liability is predicated. At least it states the general rule where the cause of action has no common law background, but is strictly of a statutory nature, as is the case with actions based on survival statutes.⁴⁸

⁴⁷*Supra* note 46 at 161-62, 24 P.2d at 136-37.

⁴⁸*Supra* note 38. The rule in respect of common law causes of action which have been codified has been stated thus:

This rule (that a cause of action or remedy dependent upon a statute falls with a repeal of the statute) only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated that the cause of action is a vested property right which may not be impaired . . . *Callet v. Alioto*, 210 Cal. 65, 290 Pac. 438, 440 (1930).

The repealing statute contains no saving clause as to actions not pending at the time of repeal.⁴⁹ Further, there is no general saving statute in the Codes.⁵⁰ Therefore, it would seem that those causes of action which had arisen prior to the repeal but which had not yet been filed at that date should be found to have abated.

As to actions pending at the time of the repeal, the principles enunciated above should control except in so far as they were preserved by the saving clause in the repealing statute. Rule 86 of the M. R. Civ. P. provided:

(a) *Effective Date and Application to Pending Proceedings.*

These rules will take effect on January 1, 1962. They govern all proceedings and actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the action was brought applies.

In view of the discretion vested in the court by the clause above, a court could have taken any of three alternative positions: that the action abated; that the action could be prosecuted to a final conclusion; that the court would take the matter under advisement, waiting to see whether the Legislature would reenact the statute with retroactive effect. Since the alleged error in repealing the statute was discovered almost immediately after the promulgation of the M. R. Civ. P., many courts may have taken pending actions under advisement.

IV.

Assuming that the court were to find that the statute states a rule of substantive law, what then would be the effect upon actions, whether pending or not yet filed, of the repeal of the statute upon which they were predicated?

It has been held that "the repeal of a statute does not take away the plaintiff's cause of action under it for damages for an injury to person or property."⁵¹ It has further been held that this doctrine applies to causes of action based solely upon statute,⁵² as well as to causes of action which have a common law basis.⁵³ *Cusick v. Feldpausch*,⁵⁴ a Michigan case, distinguished between substantive and procedural statutes, stating that if a statute was substantive in nature, then although the cause of action was

⁴⁹LAWS OF MONT. 1961, ch. 13.

⁵⁰It has been contended that R.C.M. 1947, § 12-206 is a general saving statute. That section provides that "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this code as far as applicable." However, the court has made it clear that this statute does not in any sense constitute a general saving statute, and that its only function was as an emergency measure to prevent loss of rights and abatement of actions upon adoption of the code. *Continental Oil Co. v. Montana Concrete Co.*, 63 Mont. 223, 207 Pac. 116 (1922).

⁵¹*Lewis v. Pennsylvania R.R.*, 220 Pa. 317, 69 Atl. 821, 823 (1908).

⁵²*Cusick v. Feldpausch*, 259 Mich. 349, 243 N.W. 226 (1932).

⁵³*Supra* note 52.

⁵⁴*Supra* note 53.

predicated solely upon statutory authority, a repeal of the statute could not divest the plaintiff of a cause of action which had arisen prior to the repeal.

Contra to the holding in *Cusick*, other courts have held that even though a statute be substantive in nature, if the action has no common law basis then a repeal of the statute abates the cause of action in the absence of a saving clause.⁶⁵

In deciding this question, the court must again refer to the interests to be affected and the policies that are intended to be effectuated. Should the court hold that those causes of action that accrued prior to the repeal were vested rights, and that the repeal of the statute had no effect on them, then it will be faced with the question of how to protect these rights. Undoubtedly some actions have not been commenced because of the repeal. Suppose that the statute of limitations has now run. If these were vested rights, then it would seem that the failure to prosecute the action amounts to laches on the part of the plaintiffs, and the action should be barred. The court will be determining, by an after the fact consideration, that the actions could have properly been instituted at any time, even though the statute had been repealed.

If the court feels that the interest to be protected is the right to pursue the remedy and that public policy demands that a retroactive application of the statute be allowed in order to provide a remedy for injuries inflicted during the period of repeal, then the court could better achieve this result by holding that the causes abated with the repeal. By finding that the statute is procedural and properly retroactive, the court could then reinstate those causes of action which abated.

V.

Assuming that the statute is held to be procedural, and that it can constitutionally be applied retroactively, what is the status of those causes of action that had not been filed at the date of repeal? If they are held to have abated with the repeal, can they now be reinstated? The court should hold that these actions can be reinstated.

The evident intent of the Legislature in making the statute retroactive to the date of repeal was to reinstate the remedy as though it had never been repealed. In this way a remedy is provided for injuries inflicted during the period that the repeal was effective as well as for those causes that had accrued prior to repeal, but which were lost due to the repeal. If the statute can constitutionally be applied retroactively, actions which accrued prior to repeal should be reinstated, as of the date of reenactment, in exactly the same position in which they stood at the date of repeal.

The court will, in the event that the solution above is accepted, be forced to a determination of the effect of the statute of limitations upon

⁶⁵*Callet v. Alioto, supra* note 49. The court in that case, and in the cases cited by the court, distinguished between actions based on the common law and actions based strictly on statute, rather than distinguishing between substantive and procedural statutes.

those causes which were held to have abated. While there is apparently no authority exactly in point, the court can analogize to other instances in which a suspension of the statute of limitations is allowed.

In certain situations the Montana Legislature has provided for a tolling of the statute of limitations. Where the person against whom a cause of action has accrued is out of the state, the statute is suspended during his absence.⁵⁶ If a person entitled to bring an action is under certain disabilities, such as insanity, minority, or imprisonment the statute does not run.⁵⁷ The Legislature has also provided that the statute shall be suspended for a certain period of time where the person entitled to bring the action dies before commencing the action,⁵⁸ or where a person against whom a cause of action exists dies outside the state.⁵⁹

The Legislature has demonstrated an intent that a person shall not lose the right to commence and prosecute an action through no fault of his own. The general rule has been stated thus:⁶⁰

If a party without any fault of his own has been deprived of his remedy by some superior power, it has been held that the statute will not run while the disability continues, although it is not an exception (specifically mentioned) in the statute.

In *San Francisco Sav. Union v. Irwin*⁶¹ it was held that "no statutes can run against one to whom the courts are closed for the maintenance of his claim."⁶² While the facts in that case were different than those presented by the question here under consideration, it is submitted that the intent behind the pronouncement is the same as that which motivated the Montana Legislature when it enacted the statutes discussed above. The same considerations should govern the present problem.

Causes of action which had not yet been filed at the time of the repeal should be reinstated. Pending actions, if held to have abated, should be reinstated. If the courts allowed actions pending to be completed under the saving statute, no problem exists. As to those actions taken under advisement, if any were, they should now be concluded.

VI.

There is no question that the authorities conflict upon the disposition to be made of the many questions raised by the attempted retroactive application of a statute. A strong argument can be made for the proposition that the survival statute is in fact substantive in nature.⁶³ Should the Montana court determine that the statute is substantive, then it will

⁵⁶R.C.M. 1947, § 93-2702.

⁵⁷R.C.M. 1947, § 93-2703.

⁵⁸R.C.M. 1947, § 93-2704.

⁵⁹R.C.M. 1947, § 93-2705.

⁶⁰54 C.J.S. *Limitation of Actions* § 216 (1948).

⁶¹28 Fed. 708 (D. Cal. Cir. 1886), *aff'd* 136 U.S. 578 (1890).

⁶²*Id.* at 715.

⁶³See *Grant v. McAuliffe*, 41 Cal. 2d 437, 264 P.2d 944 (1953) for the discussion and cases cited therein. See also *Rodriguez v. Terry*, 79 Ariz. 348, 290 P.2d 248 (1955), where the Arizona court considered the decision of the California court in *Grant v. McAuliffe* but refused to follow that case, holding that a survival statute is substantive so far as Arizona law is concerned.

be faced with the question of whether a retroactive application will interfere with vested rights.

For example, since the survival statute is strictly statutory in nature, with no common law basis,⁴⁴ is a defense based upon the absence of a statute a vested right? A defense has been held to be a vested right. In *Lewis v. Pennsylvania Railroad Co.*⁴⁵ the court said that "a legal exemption from a demand made by another is a vested right, which the Legislature may not interfere with. Even an expressed purpose that an act shall have such retroactive effect is without avail. . . ."⁴⁶ In that case the defense was based upon a statute which provided for no liability. The plaintiff argued that the repeal of the statute after the accident abated the defense and that an action for damages could be maintained. The court held that the action could not be maintained, saying that⁴⁷

The repeal of the act of 1868 makes railroad companies liable under circumstances which before exempted them. It is entirely competent for the Legislature to make such changes, and impose liability where none was before, but legislation of this kind cannot operate retrospectively, but must be confined to future occurrences.

Based upon the reasoning of the court in the *Lewis* case, if the Montana court determined that the survival statute is substantive, it might well find that a retroactive application of the statute would be unconstitutional in that it interferes with vested rights by abrogating defenses.

Suppose that an injury was inflicted after the repeal, but that death did not occur until after the reenacted statute became effective. If the statute is found to be substantive, the court will have to resolve at least one difficult problem. At what time did the cause of action in the personal representative accrue; at the time of death, or at the time of the injury?

If the action accrued at the time of death, then it would seem that the statute, through strictly a prospective application, might be made applicable since the statute was in effect at the date of death.

However, if the action accrued at the time of the injury, then an application of the statute would be retroactive. The court then must determine whether any vested rights will be affected by a retroactive application of the statute.

The Texas court, in *Slate v. City of Fort Worth*,⁴⁸ was faced with a similar problem, although the statute there in question was in the nature of a wrongful death statute rather than a survival statute. In that case, at the time of injury no cause of action would lie. However, the statute was amended and at the date of death an action would lie. The court said that since "the foundation of the action is the act or omission which causes the injury"⁴⁹ and since the statute is substantive in nature, a

⁴⁴*Dillon v. Great No. Ry.*, 38 Mont. 485, 100 Pac. 960 (1909); *Cort v. Steen*, 36 Cal. 2d 437, 224 P.2d 723 (1950).

⁴⁵220 Pa. 317, 69 Atl. 821 (1908).

⁴⁶*Id.* at 822.

⁴⁷*Ibid.*

⁴⁸193 S.W. 1143 (Tex. Civ. App. 1917).

⁴⁹*Id.* at 1144.

cause of action will not lie based upon the injury inflicted prior to the amendment. The court held that such an application of the statute would be retroactive and contrary to the Constitution. Since there was no expression of legislative intent that the statute be applied retroactively, the court had no occasion to consider the question of whether any vested rights would be affected by such an application.⁷⁰

CONCLUSION

The problem posed by the Montana Legislature is not an easy one. There are many facets of the problem which will require the Montana court to exercise sound judgment in an attempt to achieve the legislative expression of intent and to effectuate paramount policy choices. It is a general rule that the legislative expression of intent must be given controlling force if possible. The Montana court expressed this rule in *Tipton v. Sands*:⁷¹

Every reasonable doubt must be resolved in favor of legislative action. The court must determine not whether it is possible to condemn, but whether it is possible to uphold the Act which is attacked; every presumption being in favor of its validity.

It is submitted that the court can achieve this end in the manner indicated above. The court need not fear that a deteration that the statute is procedural for purposes of the constitutional question of retroactive application binds it to this determination for all questions which might arise in the future. As noted by Professor Cook, the distinction between substantive and procedural law is "drawn for a number of different purposes, each involving its own social, economic, or political problems."⁷²

The Montana court has previously held the survival statute to be procedural.⁷³ Public policy, coupled with the court's prior decision and the legislative intent provide the court with a solid basis for such a decision. The court should find the statute to be procedural, at least for purposes of retroactive application. This would not be an eneroachment upon constitutional safeguards.

ROBERT G. ANDERSON

ROADBLOCKS AND THE LAW OF ARREST IN MONTANA

INTRODUCTION

Revised Codes of Montana, 1947, section 94-6030 provides:
The duly elected or appointed law enforcement officers of this state, and their deputies, are hereby authorized to establish, . . . temporary roadblocks on the highways of this state for the purpose of identifying drivers, and apprehending persons wanted for viola-

⁷⁰*Ibid.*

⁷¹103 Mont. 1, 16, 60 P.2d 662, 669 (1936).

⁷²Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 342 (1932-33).

⁷³Dillon v. Great No. Ry., *supra* note 65.